Joseph Guy Maiorano, Esq. (SBN 113876)
The Law Offices of Joseph G. Maiorano
402 West Broadway, 27th Floor
San Diego, California 92101
Telephone: (619)230-1612
Fax: (619) 230-1839

Counsel for Respondent
DAMON ABNOS

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

SELTZER CAPLAN McMAHON VITEK, a Law Corporation, Petitioner, v. DAMON ABNOS, an individual, Respondent.	Case No. 3:08-cv-00201-WQH-WMc **RESPONDENT DAMON ABNOS' OPPOSITION TO PETITIONER'S MOTION FOR REMAND TO STATE COURT** Judge: Hon. William Q. Hayes Courtroom: 4 (4th Floor) Date: April 25, 2008 Time: 1:30 p.m.

TOPICAL INDEX

I. INTRODUCTION . . . 2

A. ARBITRATION ISSUES . . . 2

1. SELECTION OF AN ARBITRATOR . . . 3

2. SCMV CHOOSES TO DISCLOSE EVIDENCE CODE §1152 SETTLEMENT NEGOTIATIONS . . . 3

3. SCMV'S ACTIONS PREJUDICED RESPONDENT AT THE ARBITRATION HEARING 4

II. REMOVAL OF SCMV'S ACTION WAS PROPER . . . 5

A. RESPONDENT FILED HIS PETITION TO VACATE THE ARBITRATION AWARD IN FEDERAL COURT PRIOR TO RECEIVING NOTICE OF SCMV'S PETITION TO CONFIRM FILED IN STATE COURT . . . 5

B. THE STATE COURT CLERK ADVISED COUNSEL THAT THERE WAS NO DISMISSAL IN THE COURT'S FILE FOR THE ORIGINAL STATE COURT ACTION; OTHERWISE, SCMV'S PETITION TO CONFIRM THE ARBITRATION AWARD WOULD NOT HAVE BEEN ACCEPTED FOR FILING IN THAT FORUM . . . 5

III.. LEGAL ARGUMENT . . . 6

A. THE STATE COURT ACTION WAS DISMISSED IN ITS ENTIRETY . . . 6

1. DISMISSAL OF THE STATE COURT ACTION WAS PROPER . . . 7

2. VOLUNTARY DISMISSAL OF A STATE COURT ACTION DEPRIVES THE STATE COURT OF SUBJECT MATTER JURISDICTION . . . 7

3. SCMV CONSENTED TO THE DISMISSAL OF THE STATE COURT ACTION, AND NO REQUEST WAS MADE THAT THE STATE COURT RETAIN JURISDICTION FOR ANY PURPOSE . . . 8

B. RESPONDENT DID NOT CONTRACTUALLY WAIVE HIS RIGHT TO REMOVE . . . 12

C. RESPONDENT'S INADVERTENT FAILURE TO ATTACH COPIES OF ALL PLEADINGS AND PROCESS IS A REMEDIAL OMISSION THAT HAS NOT PREJUDICED PETITIONER . . . 12

D. RESPONDENT'S REMOVAL OF THE STATE COURT ACTION WAS OBJECTIVELY REASONABLE-IF THIS COURT GRANTS THE MOTION TO REMAND, SCMV'S OVERBLOWN REQUEST FOR ATTORNEY'S FEES AS "SANCTIONS" SHOULD BE DENIED . . . 16

1. SCMV SEEKS REIMBURSEMENT FOR "LEGAL RESEARCH AND ANALYSIS," BUT REPEATEDLY CITES OVERRULED AND SUPERCEDED CASE LAW . . . 18

2. SCMV SEEKS REIMBURSEMENT FOR UNSUPPORTED ALLEGATIONS AND IRRELEVANT MUDSLINGING COMPRISING MORE THAN THIRTY PERCENT OF ITS MOTION. 18

3.. SCMV ALLEGES IT SPENT 1.7 HOURS REVIEWING A FOUR PAGE DOCUMENT 19

IV. CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL

Albion Pacific Property Resources, LLC v. Seligman
(2004) 329 F. Supp. 2d 1163 17

Breuer v. Jim's Concrete of Brevard, Inc.
(2003) 538 U.S. 691 18

Chapman & Cole v. Itel Container Int'l B.V.
(5th Cir. Tex 1989) 865 F. 2d 676 13

Christianburg Garment Co. v. EEOC
(1978) 434 U.S. 412 20

Circle Industries USA, Inc. v.. Parke Construction Group, Inc.
(1999) 183 F.3d 105 11

Covington v. Indemnity Inc. Co. Of N. Am.
(5th Cir/ 1958) 251 F.2d 930 14

Dri Mark Prods., Inc. v. Meyercord Co.
(S.D.N.Y. 1961) 194 F. Supp 536 13

Efford v. Miliam
(E.D. Pa. 2005) 368 F. Supp.2d 380 14

Erie Railroad Co. v. Tompkins
(1938) 304 U.S. 64 18

Gafford v. General Electric Co.
(6th Cir. 1993) 997 F.2d 150 14

Gilfert v. Liberty Mutual Ins. Co.
(W.D. Ky. 2006) 2006 U.S. Dist. LEXIS 4532 14

Houston v. Scheno
(2007) 2007 U.S. Dist. LEXIS 56076 17

Huffman v. Saul Holdings Limited Partnership.
(10th Cir. 2001) 262 F.3d 1128 17

Laube v. Allen
(2007) 506 F. Supp.2d 969 17

Martin v. Franklin Capital Corp.
(2005) 546 U.S. 132 . . . . 16, 17, 20

Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.
(9th Cir. 1984) 741 F.2d 273 18

Powerex Corp. v. Reliant Energy Services, Inc.
(2007) 127 S. Ct. 2411 18

Riehl v. National Mut. Inc. Co.
(7th Cir. 1967) 374 F.2d 739 14

Shamrock Oil Corp. v. Sheets
(1941) 313 U.S. 100 18

Sinclair v. City of Rochester
(2007) 2007 U.S. Dist. LEXIS 77566 17

Stephens v. State Farm Fire & Cas. Co.
(11th Cir. 2005) 149 Fed. Appx. 908 14

Venegas v. Mitchell
(1990) 495 U.S. 82 17

Yellow Transp., Inc. v. Apex Digital, Inc.
(D. Kan. 2005) 406 F. Supp.2d 1213 . . . . 13, 14, 15

Young v. Community Assessment & Treatment Services, Inc.
(2007) 2007 U.S. Dist. LEXIS 82288 . . . . 13, 14, 15, 16

CALIFORNIA

Aetna Casualty & Surety Co. v. Humboldt Loaders, Inc.
(1988) 202 Cal. App. 3d 921 7

Associated Convalescent Enterprises v. Carl Marks & Co., Inc.
(1973) 33 Cal. App.3d 116 . . . . 7, 8

Brock v. Kaiser Foundation Hospitals
(1992) 10 Cal. App.4th 1790 10

Byerly v. Sale
(1988) 204 Cal. App.3d 1312 9

Casa de Valley View Owner's Assn. V. Stevenson
(1985) 167 Cal. App.3d 1182 11

Charles J. Rounds Co. v. Joint Council of Teamsters No. 42
(1971) 4 Cal.3d 888 7

Cook v. Stewart McKee & Co.
(1945) 68 Cal.App.2d 758 8

Datner v. Mann Theatres Corp.
(1983) 145 Cal. App. 3d 768 7

Dodd v. Ford
(1984) 153 Cal. App.3d 246 9

Doers v. Golden Gate Bridge Highway and Transportation District
(1979) 23 Cal.3d 180 18

Eddings v. White
(1964) 229 Cal. App.2d 579 8

Egly v. Superior Court
(1970) 6 Cal. App.3d 476 8

Gherman v. Colburn
(1971) 18 Cal.App. 3d 1046 8

Groth Bros. Oldsmobile, Inc. v. Steven V. Gallagher
(2007) 97 Cal. App.4th 60 7

Gunderson v. Superior Court
(1975) 46 Cal. App. 3d 138 18

Gutkin v. University of Southern California
(2002) 101 Cal. App.4th 967 8

Harris v. Billings
(1993) 16 Cal.App.4th 1396 . . . . 7, 12

Huntington Park Improv. Co. v. Superior Court
(1911) 17 Cal. App.692 8

Klinghoffer v. Barasch
(1970) 4 Cal. App.3d 258 8

Long v. Superior Court
(1936) 14 Cal. App.2d 753 8

Moncharsh v. Heily & Blase
(1992) 3 Cal.4th 1 . . . . 7, 12

O'Dell v. Freightliner Corp.
(1992) 10 Cal. App. 4th 645 7

Riley v. Superior Court
(1957) 49 Cal.2d 305 11

Utah Const. Co. v. Western Pac. Ry. Co.
(1916) 174 Cal. 156 18

Wackeen v. Malis
(2002) 97 Cal. App.4th 429 11

Viejo Bancorp, Inc. v. Wood
(1989) 217 Cal. App. 3d 200 . . . . . 11, 12

STATUTES

CALIFORNIA CODE OF CIVIL PROCEDURE

§473 11

§581 7

§581(c) 7

§1295 9

§1446(a) 13

§1447(c) 13, 14, 15, 16, 17

TREATISES

29 A Federal Procedure, Lawyers Ed. (West 1998) §69.75;
14c Wright, C. Miller, A. & Cooper, E., Fed. Practice & Proc. § 3733 13

H.R. Rep. No. 100-889, at 72 (1988) as reprinted in 1988 U.S.C.C.A.N. 5982, 6031-6033 15

I. Introduction

Rather than strictly addressing the facts and the law in its Motion to Remand this action to State Court, Petitioner Seltzer Caplan McMahon Vitek ("SCMV") has chosen to launch a personal attack against its former client, Respondent Damon Abnos ("Abnos"). Although this plan of action by SCMV is certainly not surprising given the actions of SCMV counsel in the initial action, the accusations and misleading representations made by SCMV are irrelevant to the single issue before this Court- whether Respondent's Removal of Petitioner's state court action was proper. SCMV's multiple pages of unsupported allegations are an obvious attempt to bias this Court against Respondent. Out of an abundance of caution, Abnos briefly addresses the allegations stated in the first eight pages of SCMV's Motion to Remand.

A. Arbitration issues

SCMV has chosen to convolute the issues before this Court with eight pages of unsubstantiated allegations of alleged "misconduct" on behalf of Respondent in the scheduling and execution of the underlying arbitration. Respondent has no choice but to briefly address those issues herein.

1. Selection of an arbitrator

Petitioner repeatedly claims that Respondent "stymied" the selection of an arbitrator by "ignoring repeated phone calls and letters." These claims are untrue. During the pendency of the scheduling of the arbitration, efforts continued to be made towards settlement of the underlying action. Further, both sides disagreed on various arbitrators, and made repeated alternate suggestions. In an effort to select a neutral arbitrator not affiliated or associated in some way with SCMV or any of its members, Respondent made repeated suggestions which were refused by SCMV. At the same time, repeated suggestions by SCMV of arbitrators with pre-existing relationships with SCMV or its members were rejected by Respondent. As admitted in correspondence from SCMV to counsel for Respondent, repeated telephone calls were made between counsel regarding the selection of an arbitrator. [1]

While it can be a lengthy and frustrating process to select a neutral arbitrator, especially given the far-reaching tendrils of a large firm such as SCMV, Respondent acted in good faith in his efforts to select an arbitrator not associated with SCMV. Such a selection may not have been significant to SCMV, as evidenced by their willingness to select arbitrators with pre-existing relationships with the firm, but it was significant to Respondent. Further, if SCMV believed that Respondent was not acting in good faith or was behaving in a dilatory fashion, SCMV had the option of attempting to seek relief through the Superior Court which had previously ordered the arbitration. SCMV did not do so.

Further frustrating the expediency within which the underlying matter was arbitrated was SCMV's wrongful refusal to participate in any form of discovery whatsoever.

SCMV recites other issues in its efforts to discredit its former client, Respondent, in the initial pages of its Motion to Remand. Respondent "conveniently neglected" to pay his administrative filing fee because there was confusion on the amount he owed. Respondent "requested to stay the arbitration pending the outcome of a lawsuit in Missouri" as a *protected settlement negotiation.*

2. SCMV chooses to disclose Evidence Code §1152 settlement negotiations

Illustrating the lengths it will go to in order to facilitate its purpose, SCMV chose to disclose *irrelevant* Evidence Code § 1152 protected settlement negotiations in its Motion to Remand. As discussed above, Respondent and SCMV attempted to settle the underlying matter on more than one occasion. For reasons unclear but certainly unsurprising, SCMV has now chosen to divulge certain protected settlement negotiations in its moving papers. Although Respondent does not believe any

---

1 *See* Declaration of Christopher Ludmer, Exhibit 7, filed concurrently with Petitioner's Motion to Remand.

settlement negotiations or offers to compromise made on his behalf are damaging to his position on this Motion, it is certainly illuminating of the nature and tactics of Petitioner SCMV.

3. SCMV's actions prejudiced Respondent at the arbitration hearing

Respondent filed his Petition to Vacate the arbitration award in federal court in an effort to secure a fair and impartial determination separate and apart from the far-reaching SCMV machine. Continuing its campaign to prevent this in its Motion to Remand, SCMV goes on to dredge up details of the arbitration irrelevant to this Court's determination.

SCMV alleges that Respondent "decided not to show up" to the scheduled arbitration hearing, and "decided to travel overseas." Although spun to cast Respondent in a cavalier and irresponsible light, SCMV is correct. What SCMV neglects to mention, however, is that Respondent "decided not to show up" to the scheduled arbitration hearing because he had promised his terminally ill mother that he would take her on a religious pilgrimage before she passed away, and the arbitrator had denied his request for a continuance. Accordingly, and perhaps illustrative of his priorities which sharply conflicted with those of SCMV, Respondent "decided" to travel overseas and grant his mother's wish. However, Respondent did not "decide to have the hearing proceed in his absence;" rather, he did everything in his power to accommodate the scheduling conflict, including requesting a continuance, and his efforts were rebuked. SCMV is correct in that the hearing, which proceeded without Respondent's presence and over his valid objection, was held open for a special hearing to take Respondent's testimony. SCMV objected to the decision to hold open the hearing to take Respondent's testimony, apparently believing Respondent did not have the right to testify at the arbitration as he was unavailable on the scheduled hearing date. Perhaps this explains why, on the date of Respondent's testimony, counsel for SCMV behaved so deplorably. Respondent is of Iranian descent. Upon the initiation of Respondent's testimony, Respondent's counsel asked Respondent about his background. At this point, Christopher Ludmer, counsel for SCMV, remarked disparagingly "*we are going to hear about the goat camps now.*"[2] As

---

2 *See* Declaration of Joseph G. Maiorano ("Maiorano Decl.").

Respondent has no background in "goat camps," and counsel for SCMV (as Respondent's former marital dissolution counsel) was well aware of this fact, there is no plausible explanation for counsel's outburst other than the obvious- it was an ethnic slur. Counsel's inexcusable comment achieved the desired effect- Respondent was shocked and embarrassed, and his confidence during his testimony was shaken. SCMV's mission was accomplished.

Respondent now turns to the substantive issues before the Court.

II. Removal of SCMV's action was proper

A. Respondent filed his petition to vacate the arbitration award in federal court prior to receiving notice of SCMV's petition to confirm filed in state court.

Respondent's petition to vacate the arbitration award was drafted and signed by counsel on January 8, 2008, the same date that SCMV drafted and signed its petition to confirm the arbitration award. [3] Counsel did not receive notice of SCMV's petition to confirm the arbitration award in state court until after the competing petition had been filed in federal court, under Case Number 3:08-cv-00201-WQH-WMc.[4]

B. The state court clerk advised Counsel that there was no dismissal in the court's file for the original state court action; otherwise, SCMV's petition to confirm the arbitration award would not have been accepted for filing in that forum.

Immediately upon receipt of SCMV's petition to confirm the arbitration award filed in the dismissed original state court action, Counsel contacted the clerk in Department 64 to clarify how the petition could have been filed in the dismissed action.[5] After searching the court file for several minutes, the clerk reported that the case was still reporting as an active case, and there was no record

---

3 *See* Petition to Vacate Arbitration Award, attached to the Declaration of Joseph G. Maiorano ("Maiorano Decl.") as Exhibit 1.

4 *See* Maiorano Decl.

5 *See* Declaration of Erin M. Sunseri, ("Sunseri Decl.").

of a dismissal filed in the action.[6] The clerk went on to state that *had a dismissal been filed in the action, SCMV's petition to confirm the arbitration award would not have been accepted for filing, because filings are not accepted on dismissed cases.*[7] Counsel advised the clerk that a dismissal had been filed in June 2007, but the clerk was still unable to locate the dismissal in the court system or file, and again stated that if the case was dismissed, SCMV's petition should not have been accepted for filing under the original case number. [8]

The original case was voluntarily dismissed, at the request of SCMV, and consented to by both Respondent and SCMV. No request was made for the court to retain jurisdiction for *any purpose whatsoever.* The entire action of all parties and all causes of action was dismissed on June 7, 2007.[9]

At this point, Abnos had already filed his petition to vacate the arbitration award in federal court under federal diversity jurisdiction, knowing that the original case had been dismissed. He was now a respondent in SCMV's action to enforce the arbitration award. As two actions on the same arbitration award were pending in two different forums, Abnos filed for removal of SCMV's petition to federal court under diversity jurisdiction. SCMV's motion to remand followed.

III. Legal Argument

A. The State Court action was dismissed in its entirety

Respondent was the plaintiff in the original state court action. Upon dismissal of that action, with no requests being made to the court for retention of jurisdiction for any purpose, that case ceased to exist. It was no longer a viable forum for the bringing of any motions, petitions, or further actions. The state court clerk in Dept. 64 confirmed, as discussed above, that the petition to enforce the arbitration award would not be accepted for filing in a dismissed case. Accordingly, SCMV's

---

6 *See* Sunseri Decl.

7 *See* Sunseri Decl.

8 *See* Sunseri Decl.

9 *See* Request for Dismissal, Maiorano Decl. Exhibit 2.

petition should have been classified as a new action. As such, SCMV is the petitioner, and Abnos is the respondent, or defendant.

1. Dismissal of the State Court action was proper

A plaintiff may dismiss his or her complaint, or any cause of action asserted in it, in its entirety, or as to any defendant or defendants, with or without prejudice prior to the actual commencement of trial.[10] With a few exceptions, "the plaintiff in a lawsuit has an absolute right to dismiss. Neither the clerk nor the trial court has any discretion in the matter." [11] Dismissal is within the trial court's authority on a case wherein the parties had an agreement to arbitrate.[12]

2. Voluntary Dismissal of a State Court action deprives the State Court of subject matter jurisdiction

A voluntary dismissal of an entire action deprives the court of subject matter jurisdiction as well as personal jurisdiction of the parties. Such jurisdiction cannot be conferred by consent, waiver, or estoppel. [13] Following entry of a dismissal of an action by a plaintiff under *Code of Civil Procedure section* 581, a 'trial court is without jurisdiction to act further in the action [citations] except for the limited purpose of awarding costs and statutory attorney's fees. [14] It is a well-settled proposition of law that where the plaintiff has filed a voluntary dismissal of the action pursuant to [section 581] the court is without jurisdiction to act further, and any subsequent proceedings after

---

10 *Groth Bros. Oldsmobile, Inc. v. Steven V. Gallagher* (2002) 97 Cal. App.4th 60, 66, *citing* Code Civ. Proc.§ 581, subd. (C).

11 *O'Dell v. Freightliner Corp.* (1992) 10 Cal. App.4th 645, 659.

12 *See Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888, 890, 894, 900.

13 *Harris v. Billings* (1993) 16 Cal. App.4th 1396, 1405.

14 *Associated Convalescent Enterprises v. Carl Marks & Co., Inc.* (1973) 33 Cal. App.3d 116, 120; *Aetna Casualty & Surety Co. v. Humboldt Loaders, Inc.* (1988) 202 Cal. App. 3d 921, 931; *Datner v. Mann Theatres Corp.* (1983) 145 Cal. App.3d 768, 770; *Harris v. Billings, supra* at 1405.

the tender or entry of a dismissal are void because they are beyond the jurisdiction of the court. [15] A willful dismissal terminates the action for all time.[16]

In *Long v. Superior Court*, the court issued a writ of prohibition prohibiting the superior court judge from signing findings of fact, conclusions of law and judgment where the...plaintiff had filed a voluntary dismissal of the action. The court held, quoting from *Huntington Park Improv. Co. v. Superior Court*: "The effect of such an act [filing dismissal] on [the plaintiff's part] is, *ipso facto*, to dismiss the case, even though the clerk failed to make entry thereof in the register." The court in *Long* then said :"There being nothing before the court, it was attempting and is attempting to proceed without jurisdiction...."[17] In the instant matter, the Superior Court did in fact enter the dismissal on June 7, 2007, with notice going out on June 15, 2007. [18] The fact that the clerk was either unable to locate the dismissal in the court files or records, or the dismissal was not properly entered at the time it was filed, is irrelevant.

3. SCMV consented to the dismissal of the State Court action, and no request was made that the State Court retain jurisdiction for any purpose.

Petitioner relies on *Dodd v. Ford* and *Byerly v. Sale* to argue that the dismissal of the state court action had "no effect" whatsoever. Petitioner is incorrect.

In *Byerly*, a woman sued for medical malpractice and defendants successfully moved to compel arbitration. Thereafter, while the matter was pending in arbitration, the superior court granted a motion *by defendants* to dismiss the complaint for failure to bring the action to trial within

---

15 *Associated Convalescent Enterprises v. Carl Marks & Co., Inc, supra* at 120; *see also Gherman v. Colburn* (1971) 18 Cal.App. 3d 1046, 1050, *citing Egly v. Superior Court* (1970) 6 Cal. App.3d 476, 483; *Eddings v. White* (1964) 229 Cal. App.2d 579, 583; *see generally Klinghoffer v. Barasch* (1970) 4 Cal. App.3d 258.

16 *Gutkin v. University of Southern California* (2002) 101 Cal. App.4th 967, 975, *citing Cook v. Stewart McKee & Co.* (1945) 68 Cal. App.2d 758, 760-761.

17 *Eddings v. White, supra* at 583-584; *citing Long v. Superior Court* (1936) 14 Cal. App.2d 753, 755; *quoting Huntington Park Improv. Co. v. Superior Court* (1911) 17 Cal. App. 692, 694.

18 *See* Request for Dismissal, Maiorano Decl. Exhibit 2.

five years. The Court of Appeal reversed, holding that the was error to dismiss the action for delay in prosecution while it was stayed, since the period of the stay was excluded from five-year computation. The court also held that such a dismissal (by the defendants for lack of prosecution), even if proper, would have no effect on the *pending arbitration itself*, to which the parties had agreed pursuant to *Code of Civil Procedure* §1295. The court further held that it was for the arbitrator, not the superior court, to resolve such questions as whether reasonable diligence had been exercised in bringing the claim to resolution by arbitration so as to avoid a dismissal.[19] The appellate court in *Byerly* specifically states that mere dismissal of a previously stayed complaint *under the present circumstances* has absolutely no effect on the *pending arbitration.* The trial court did not purport to dismiss the arbitration.[20]

In the instant matter, Respondent does not assert that the dismissal of the underlying state action dismissed the arbitration itself, as the parties stipulated to binding arbitration prior to the filing of the request for dismissal. The *Byerly* court states that the complaint had fulfilled its purpose, and the court no longer had any reason to entertain the motion to dismiss the complaint for failure to prosecute brought by defendants.[21] The court goes on to state that only the arbitrator should determine whether there has been an unreasonable delay in prosecution which would justify dismissal.[22] Similarly, in *Dodd v. Ford*, the court involuntarily dismissed the plaintiff's complaint for failure to prosecute after the parties had stipulated to arbitrate.[23] The court in *Dodd*, like the court in *Byerly*, found that the dismissal did not affect the agreement to arbitrate, which could be independently enforced.[24]

---

19 *Byerly v. Sale* (1988) 204 Cal. App.3d 1312.

20 *Id*. at 1313 (emphasis added).

21 *Id.*

22 *Id.* at 1315.

23 *Dodd v. Ford* (1984) 153 Cal. App.3d 426.

24 *Id.* at 432.

Byerly, Dodd, and their progeny stand for the proposition that the fate of the action at law has no direct effect on the contractual arbitration proceedings. Consequently, the dismissal of the action at law does not constitute grounds to dismiss the arbitration proceedings.[25]

In the instant matter, the State Court did not purport to dismiss the arbitration proceeding, but rather divested itself of subject matter jurisdiction on the matter. The Court in *Brock v. Kaiser* states that "once a court grants the petition to compel arbitration and stays the action at law, the trial court retains merely a vestigial jurisdiction over matters submitted to arbitration...this vestigial jurisdiction over the action at law consists solely of making the determination, upon conclusion of the arbitration proceedings, of whether there was an award on the merits (in which case the action at law should be dismissed because of the res judicata effects of the arbitration award [citations] or not..."[26]

In contrast, the State Court in the instant matter entered the dismissal of the entire action prior to the conclusion of the arbitration proceedings, thereby divesting itself of any limited jurisdiction to determine any subsequent petitions in the matter. Arguably, pursuant to *Brock* and its progeny, the State Court in the instant matter was premature in the granting the dismissal of the entire action prior to the conclusion of the arbitration proceeding. Nevertheless, the dismissal was entered, and once it was, 1) no motion to vacate the dismissal was brought, nor 2) was any request made for the court to maintain any manner of jurisdiction over the parties or the subject matter.

SCMV, in both requesting the dismissal be entered and consenting to the dismissal, had notice and opportunity to request that the court 1) refrain from dismissing the action until completion of the arbitration process, or 2) retain subject matter jurisdiction to enforce any arbitration award. SCMV was silent on both issues, and the dismissal was entered. Accordingly, the State Court was divested of subject matter jurisdiction. SCMV now argues that dismissing the complaint was akin to "burning a dock after the ship has sailed." In this case, SCMV lit the match

---

25 *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal. App.4th 1790, 1792.

26 *Id.* at 1795.

that burned the dock- and watched it burn while holding a fire extinguisher. Respondent does not disagree that the arbitration "ship" had already sailed; however, Petitioner now seeks to return to the "dock" to enforce the arbitration award.

Courts in other districts have held that removal of a state court petition to vacate an arbitration award to federal court where a competing petition to enforce the same arbitration award was proper based on diversity of citizenship. [27]

California cases addressing issues of voluntary dismissal upon settlement are similar to the instant matter. When a court has jurisdiction over the parties and subject matter of a suit, its jurisdiction continues until a final judgment is entered. When there is a voluntary dismissal of an *entire action*, the court's jurisdiction over the parties and the subject matter terminates. [28] In the underlying state court action, the dismissal was entered as to the *entire action*, although there are other options including "other," where the parties can specify what is to be dismissed, or request retention of jurisdiction over certain issues. When an action has been dismissed in its entirety, it is no longer "pending." [29]

In the absence of a motion under Code of Civil Procedure section 473 to vacate the dismissal, the court was without subject matter jurisdiction of the old action (to enforce a settlement agreement). The court in *Viejo Bancorp* distinguished cases with a dismissal of the entire action from cases in which only a partial dismissal is filed. In such cases, the trial court is never ousted of subject matter jurisdiction, and it has the power to perform further acts in the old action.[30] The court also noted that since subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel,

---

27 *Circle Industries USA, Inc. v. Parke Construction Group, Inc.* (1999) 183 F.3d 105.

28 *Wackeen v. Malis* (2002) 97 Cal. App.4th 429, 437 (emphasis added), *citing Riley v. Superior Court* (1957) 49 Cal.2d 305, 309; *Casa de Valley View Owner's Assn. v. Stevenson* (1985)167 Cal. App.3d 1182, 1192.

29 *Id.* at 438, *citing Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal. App. 3d 200, 206.

30 *Viejo Bancorp, supra* at 207.

the court cannot 'retain' jurisdiction is has lost.[31] The court recognized that while the dismissal of a case is sometimes required by a settlement agreement, "the simple answer is that no one forced Bank to agree to a settlement which provided for dismissal of the old action."[32] Motion for enforcement of a stipulated settlement must be brought while the litigation that produced such settlement is *still pending*. It necessarily follows that any request for the court to retain jurisdiction to hear and decide such motion *after* a dismissal must likewise be made during the pendency of that litigation. [33]

In the instant matter, SCMV had the opportunity to request the court retain jurisdiction over various issues, and it did not. Once the court had divested itself of jurisdiction, it could not no longer perform acts under the old case number. No one forced SCMV to consent to, in fact request, a dismissal of the action prior to the conclusion of the arbitration proceedings.

B. Respondent did not contractually waive his right to remove.

Petitioner alleges that Respondent contractually waived his right to remove the underlying action to federal court by signing the Arbitration Agreement with SCMV. Petitioner is incorrect. As discussed above, a voluntary dismissal of an entire action deprives the court of subject matter jurisdiction as well as personal jurisdiction of the parties. Such jurisdiction cannot be conferred by consent, waiver, or estoppel. [34] Accordingly, it cannot be conferred contractually.

C. Respondent's inadvertent failure to attach copies of all pleadings and process is a remedial omission that has not prejudiced Petitioner.

As discussed above, Respondent asserts that the Petition to Enforce the Arbitration award filed by Petitioner in the previously dismissed state court action constituted a "new action" in light of the dismissal. Accordingly, Respondent attached the process, pleadings, and orders received in the new action.

---

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Harris v. Billings* (1993) 16 Cal. App.4th 1396, 1405.

Petitioner states in its moving papers that Respondent neglected to attach a copy of the Notice of Hearing and Petition to his original Notice of Removal. Respondent believes that all documents were attached; however, in an abundance of caution, Respondent has prepared and filed and served herewith his Supplemental Notice of Removal, correcting the alleged procedural error.

Pursuant to 28 U.S.C. § 1446(a), a defendant seeking to remove a case to federal court must file a notice of removal signed pursuant to Rule 11 of the *Federal Rules of Civil Procedure* and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant in such action.

The majority approach holds that the district court is not *required* to grant a motion to remand for failure to file the state court papers listed in § 1446(a).[35] Under this approach, failure to file State court documents is a procedural defect that the district court may permit the removing party to remedy.[36] The majority approach is premised on reading § 1447(c) as creating two distinct bases for remand, one permissive and the other mandatory. Specifically, §1447(c) treats jurisdictional and procedural defects differently. [37]

Section 1447(c) states that a motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction the case shall be remanded. Proponents of the majority approach argue that, under the statute, failure to submit all state court documents does not mandate remand. Significantly, the second sentence of §1447(c) states that the district court "shall" remand the case for lack of subject matter jurisdiction. The district court has no discretion in this respect. Notably

---

35 *Young v. Community Assessment & Treatment Services, Inc.* (2007) 2007 U.S. Dist. LEXIS 82288, 4; *see Yellow Transp., Inc. v. Apex Digital, Inc.* (D. Kan. 2005) 406 F. Supp.2d 1213, 1219.

36 *Young, supra* at 5; *see* 29A Federal Procedure, Lawyers Ed. (West 1998) § 69.75; 14c Wright, C. Miller, A. & Cooper, E., Fed. Practice & Proc. §3733.

37 *Young, supra* at 5-6.

absent from the first sentence of the statute, however, is any indication of the extent to which the court must or should remand the case based on non-jurisdictional defects. [38]

Procedural defects such as failure to attach a summons are not central to the district court's authority. The statute recognizes the distinction between jurisdictional and procedural defects by providing the district court with discretionary authority to retain jurisdiction only when faced with a procedural defect in filing the notice of removal.[39]

There is a significant body of authority for the proposition that a district court is not required to remand on the basis of a procedural defect.[40] As noted in *Yellow Transp.*, however, both the plain language of §1447(c) and the legislative history to the 1988 amendment of §1447(c) favor the majority approach, which allows the district court to exercise some discretion when faced with a motion to remand based on a procedural defect.[41]

While the second sentence of § 1447(c) uses the word "shall" to *mandate* remand for lack of subject matter jurisdiction, Congress did not use the word "shall" in the first sentence of the statute addressing procedural defects. In fact, the first sentence is not addressed to the district court, but to the non-removing party. With this in mind, the plain language of the statute does not *mandate* remand based on a procedural defect. Second, interpreting the first sentence of §1447(c) as permitting the district court to retain jurisdiction does not deprive it of all meaning. Instead, the purpose of the sentence is to establish a deadline for objections to defects in the removal procedure.

---

38 *Id.* at 6; *citing Yellow Transp., Inc., supra* at 1218.

39 *Id.* at 7; *citing Yellow Transp., Inc., supra* at 1217-1219.

40 *Id.* at 7-8; *see Gafford v. General Electric Co.,* (6th Cir. 1993) 997 F.2d 150; *Gilfert v. Liberty Mutual Ins. Co.* (W.D. Ky. 2006) 2006 U.S. Dist. LEXIS 4532; *Covington v. Indemnity Inc. Co. Of N. Am.,*(5th Cir. 1958) 251 F.2d 930, 931, cert. denied, 357 U.S. 921, 78 S.Ct. 1362 (finding omissions to the record "merely modal and formal and...completely without effect upon the removal, if the case is in its nature removable"); *Dri Mark Prods., Inc. v. Meyercord Co.,* (S.D.N.Y. 1961) 194 F. Supp 536 (stating [o]missions which are merely formal or modal do not affect the right to remove and such technical defects may be subsequently remedied"); *Stephens v. State Farm Fire & Cas. Co.* (11th Cir. 2005) 149 Fed. Appx. 908, 910; *Riehl v. National Mut. Ins. Co.* (7th Cir. 1967) 374 F.2d 739, 742 (permitting an inadvertently omitted document to defeat the district court's jurisdiction, "would be to elevate form over substance."); *Efford v. Miliam* (E.D. Pa. 2005) 368 F. Supp. 2d 380, 383.

41 *Id.* at 10; *citing Yellow Transp., Inc., supra* at 1218.

After thirty days, the non-removing party may not object to a procedural defect. In contrast, the second sentence indicates that there is no time limit on an objection based on subject matter jurisdiction.[42]

The majority view's reading of § 1447(c) is fully supported by the legislative history to the 1988 amendments to the statute.[43] The purpose of the amended § 1447(c) is to establish a limited time period in which a party may object to a defect in removal procedure without suggesting that there are any time limitations on remand for lack of subject matter jurisdiction.[44] Nothing in this legislative history suggests that Congress intended to *require* the district court to grant *all* motions to remand on the basis of a procedural defect that are filed within the thirty day window. The legislative history states that remand of the basis of a procedural defect must be *sought* within 30 days; it does not say that a timely motion to remand on the basis of a procedural defect must be granted.[45] Case law supports this majority approach as well.[46]

The *Yellow Transp.* opinion provides that a defendant's failure to attach the summons to the notice of removal was inadvertent and trivial. In and of itself, the failure did not unduly burden the court or reflect the complete failure to follow the removal procedure that typically leads to remand orders where the motion is made outside the thirty-day window or where all defendants do not join. Important, also, is the fact that plaintiff has suffered absolutely no prejudice whatsoever from the defect and this defect can be easily remedied by allowing defendant to file its proposed amended notice of removal.[47] Similarly, the *Young* court held that the Defendants' failure to attach the State

---

42 *Id.* at 11-12.

43 *Id.* at 12; *see also* H.R. Rep. No. 100-889, at 72 (1988) as reprinted in 1988 U.S.C.C.A.N. 5982, 6031-6033. (Congress listed "simplifying the 'pleading' requirements for removal as "one of the general purposes of amending the removal procedure statute.)

44 *Id.* at 13.

45 *Id.* at 13-14.

46 *Id.*

47 *Id.* at 16; *citing Yellow Transp., Inc., supra* at 1219.

court summonses was a trivial omission that did not unduly burden the court or prejudice the other party. In fact, the record was made complete in light of the Defendants' filing a supplemental notice of removal containing the missing summonses.[48] The court held that it was both appropriate and fair to allow the failure to file all documents to be cured by the supplemental filing. [49]

In the instant matter, as discussed above, Respondent believes all documents were attached to the Notice of Removal. If, however, as Petitioner asserts, the Notice of Hearing and Petition was missing, the Court record has been made complete by Respondent's Supplemental Notice. Further, Petitioner is in no way prejudiced by the omission as the Notice was filed and served *by* the Petitioner originally. Further, the Notice itself is nothing more than a formality, containing the date and time of the hearing which is also on the Petition to Enforce the Arbitration Award. The Petition to Enforce the Arbitration Award was attached to the original Notice of Removal.

For the reasons set forth herein, Respondent should be allowed to complete the record by filing the Supplemental Notice filed and served herewith.

D. Respondent's removal of the State Court action was objectively reasonable- If this Court grants the motion to remand, SCMV's overblown request for attorney's fees as "sanctions" should be denied.

Section 1447(c) provides that a remand order "may"- not "shall" or "should" require payment of attorneys fees. [50]The U.S. Supreme Court issued guidance in *Martin v. Franklin Capital Corp.* regarding the standard for awarding fees in a Motion to Remand: [T]he standard for awarding fees should turn on the reasonableness of the removal. Absent unusual circumstances, courts may award attorney's fees under §1447(c) *only where the removing party lacked an objectively reasonable basis for seeking removal.* Conversely, when an objectively reasonable basis exists, fees should be denied.[51] "It cannot be said that Defendant's assertion that complete diversity jurisdiction existed between the parties at the time of removal lacked an objectively reasonable basis."[52]

---

[48] *Id.* at 16.

[49] *Id.* at 18.

[50] *Martin v. Franklin Capital Corp.*, (2005) 546 U.S. 132, 136.

The Tenth Circuit has concluded that section 1447(c) requires courts to determine whether the requested fee is reasonable. The Court noted that district courts have long presumed that an attorney fee award under section 1447(c) must be reasonable.[53] Pointing to the section 1447(c) language "incurred as a result or removal," the court observed that "unreasonably high fees are not 'incurred' as a result of removal[54];, rather, excessive fee requests flow from, and accumulate by means of, improper billing practices."

A reasonable attorney fee is the number of hours and the hourly rate that would be billed by reasonably competent counsel.[55] Reasonably competent counsel bill a reasonable number of hours. Reasonable competent counsel do not bill hours that are "excessive, redundant, or otherwise unnecessary." [56] Where an attorney's fee request is not directly and reasonable incurred in securing any form of relief, it is non-compensable.[57]

One of the allegations made by Respondent against SCMV in the underlying legal malpractice arbitration was that SCMV billed for work that was unnecessary or incorrect. SCMV's request for inappropriate "sanctions" is illustrative of this point.

1. SCMV seeks reimbursement for "legal research and analysis," but repeatedly cites overruled and superceded case law.

---

51 *Sinclair v. City of Rochester* (2007) 2007 U.S. Dist. LEXIS 77566, 3; *citing Martin v. Franklin Capital Corp.*, (2005) 546 U.S. 132 (emphasis added).

52 *Sinclair, supra* at 91 *citing Houston v. Scheno* (2007) 2007 U.S. Dist. LEXIS 56076, 12.

53 *Albion Pacific Property Resources, LLC v. Seligman* (2004) 329 F. Supp. 2d 1163, 1165, *citing Huffman v.. Saul Holdings Limited Partnership* (10th Cir. 2001) 262 F. 3d 1128, 1134.

54 *Id.* at 1165, *citing Huffman v. Saul, supra* at 1134.

55 *Id.* at 1165, *citing Venegas v. Mitchell* (1990) 495 U.S. 82, 86.

56 *Laube v. Allen* (2007) 506 F. Supp.2d 969 .

57 *Laube, supra* at 969.

SCMV would like the Court to believe that it spent 15.5 hours conducting legal research and analysis of case law and statutes in preparing its Motion to Remand. Despite this assertion, SCMV cites to multiple cases which have been overruled or superceded.[58] In some instances, these cases contribute large block quotations to emphasize a point SCMV is trying to argue. Continuing its pattern of deception and unsupported allegations, SCMV does not alert the Court to the fact that multiple cases are superceded or overruled, even if done so on unrelated grounds. Clearly, SCMV's claim for "legal research and analysis" is excessive, as the cited cases are outdated, and apparently not Shepardized. SCMV should not be rewarded for presenting misleading evidence to this Court.

2. SCMV seeks reimbursement for unsupported allegations and irrelevant mudslinging comprising more than thirty percent of its Motion.

Not content with simply launching yet another personal attack against its former client, SCMV now seeks reimbursement for 33 hours to "review case files and prepare" the Motion to Remand with supporting exhibits. As discussed above, SCMV's recitation of allegations regarding Respondent and the underlying arbitration is *completely irrelevant* to the issue before this Court- whether or not removal of the state court action was proper. Respondent's conduct, although he denies the allegations set forth *ad nauseam* in Petitioner's moving papers, is irrelevant to the simple issue of whether or not this Court has jurisdiction over Petitioner's Petition to Enforce the Arbitration Award. Respondent's refusal to select arbitrators affiliated with SCMV, his decision to

---

58 *See Erie Railroad Co.v. Tompkins* (1938) 304 U.S. 64, *superceded by statute* as stated in *Chapman & Cole v. Itel Container Int'l B.V.* (5th Cir. Tex 1989) 865 F.2d 676; *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.* (9th Cir. 1984) 741 F.2d 273, *overruled in part by Powerex Corp. v. Reliant Energy Services, Inc.* (2007) 127 S. Ct. 2411; *Shamrock Oil Corp. v. Sheets* (1941) 313 U.S. 100, *superceded by statute* as stated in *Breuer v. Jim's Concrete of Brevard, Inc.* (2003) 538 U.S. 691; *Gunderson v. Superior Court* (1975) 46 Cal.App. 3d 138, *overruled in part by Doers v. Golden Gate Bridge, Highway and Transportation District* (1979) 23 Cal.3d 180; and *Utah Const. Co. v. Western Pac. Ry. Co. (1916) 174 Cal. 156, overruled by Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1.

accompany his terminally ill mother on her religious pilgrimage, and his confusion over the amount of fees owed at the onset of the arbitration are not facts which will assist this Court in rendering its decision. Instead, it is mudslinging in a continuing pattern of conduct designed by SCMV to bias this Court against Respondent.

In any event, such conduct is not contributive to the substance of Petitioner's motion, and should not be rewarded. SCMV spends allegedly "billable" time quoting and attaching letters to counsel relative to the scheduling of the arbitration which were sent nearly eighteen months ago. SCMV did not seek redress from the Court or the arbitrator for conduct alleged in this correspondence. Now, however, SCMV wastes the Court's time with baseless accusations and irrelevant materials related to these scheduling issues in an effort to muddy the waters. Such conduct should not be rewarded, and is not certainly not compensable.

3. SCMV alleges it spent 1.7 hours reviewing a four page document

SCMV alleges it spent 1.7 hours reviewing Respondent's four page Notice of Removal, and attached exhibits. The exhibits to the Notice included Petitioner's Petition to Enforce the Arbitration Award, Respondent's Petition to Vacate the Arbitration Award, and Notice to the Superior Court and SCMV itself of the pending removal.[59] Other than the two Notices, Petitioner was already in possession of the exhibits; in fact, one of them was Petitioner's own document. Clearly, SCMV's "billing" on this matter as a whole, but in this instance in particular, is excessive at best.

By enacting the removal statute, Congress granted a right to a federal forum to a limited class of state-court defendants. If fee shifting were automatic, defendants might choose to exercise this

59 *See* Notice of Removal, previously filed with the Court.

right only in cases where the right to remove was obvious.[60] There is no reason to believe that Congress meant to confer a right to remove, while at the same time discouraging its exercise in all but obvious cases. [61]

Respondent had an objectively reasonable basis for removing the state court action to federal court, as discussed above. Specifically, Respondent's reliance on the dismissal of the state court action in its entirety and the representations of the state court clerk regarding rejection of Petitioner's Petitioner to Enforce the Arbitration Award in a dismissed case were certainly reasonable. Should this Court grant Petitioner's Motion to Remand, Respondent requests that SCMV's request for attorney's fees as "sanctions" be denied; or, in the alternative, Respondent respectfully requests to reserve the right to complete further briefing on this issue should the Court deem it necessary.

IV. Conclusion

Respondent properly removed Petitioner's Petition to Enforce the arbitration award from the previously dismissed state court action. The state court divested itself of all jurisdiction upon dismissal, when no requests were made for retention of jurisdiction. Complete diversity exists between the parties. Accordingly, and based on the above, Respondent respectfully requests that SCMV's Motion to Remand be denied.

In the alternative, Respondent requests that if the Motion to Remand is granted, SCMV's request for attorney's fees as "sanctions" be denied based on both the objectively reasonable nature of Respondent's removal, and the unreasonable and overblown nature of SCMV's billing practices, including excessive billing for overruled and superceded case law research and drafting of excessive

---

60 *Martin v. Franklin Capital Corp.*, (2005) 546 U.S. 132, 140; *citing Christiansburg Garment Co. v. EEOC.* (1978) 434 U.S. 412, 422 (awarding fees simply because the party did not prevail "could discourage all but the most airtight claims, for seldom can a party be sure of ultimate success).

61 *Id.*

and irrelevant material in the Motion for the simple purpose of alienating the Court against Respondent.

Respondent seeks a fair and impartial forum in which to have his Petition to Vacate the arbitration award heard. Be it in federal court or state court, Respondent simply seeks an opportunity to redress the wrongs that have been perpetrated by both his former counsel, and the arbitration award.

Dated: April 11, 2008

Law Offices of Joseph G. Maiorano

Joseph Guy Maiorano

Attorney for DAMON ABNOS